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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re ANGEL A. et al., Persons Coming Under
the Juvenile Court Law.

MERCED COUNTY DEPARTMENT OF
HUMAN SERVICES,

Plaintiff and Respondent,

v.

ANGEL A.,

Defendant and Appellant.

F043756

(Super. Ct. No. 25594)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Frank Dougherty, Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruben E. Castillo, County Counsel, and David A. Olsen, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Buckley, J., and Levy, J.

Angel A. appeals from an order terminating his parental rights (Welf. & Inst. Code, § 366.26) to his three-year-old and seven-year-old sons.¹ Appellant contends the court erred by denying his section 388 petition to gain custody of the boys. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

In June 2002, the Merced County Superior Court adjudged appellant's sons dependent children and removed them from parental custody. The court previously determined, based on the parents' submission, that the boys came within its jurisdiction under section 300, subdivisions (b) and (g). The boys were at a substantial risk of suffering serious physical harm because their mother failed to adequately protect them. The mother was found in her home under the influence of methamphetamine and in possession of the narcotic and drug paraphernalia. She was then incarcerated and unable to provide any care for the boys.

For his part, appellant did not live with his sons at or before the time of their original detention. He in fact had a transient lifestyle. Further, he was aware of what turned out to be the mother's chronic use of drugs. He also suspected the mother was not feeding the children. However, he never took any steps to protect them from either their mother's drug abuse or her neglect.

At the outset of these proceedings, appellant was living with his aunt and working temporarily in Fresno. He also had an outstanding warrant for his arrest in San Benito County. He explained to social workers that although he would like to have the children placed with him, he needed to first resolve the outstanding warrant. He also acknowledged he would need a steady job and a place of his own in order to have the boys live with him.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

By the time of the June dispositional hearing, appellant was serving time on the outstanding warrant for a probation violation. Having recognized appellant as the boys' presumed father, the court ordered reunification services for his benefit. The children were placed with a paternal aunt and uncle.

Over the next six months, appellant did little to reunify. He was released from custody at some point and in early October entered a court-ordered drug rehabilitation program. However, he was re-arrested for another probation violation in mid-October 2002. By the end of October, he reentered the program, which was a six-month residential treatment program located in Santa Clara County. He was also attending some Narcotics Anonymous (N/A) meetings. On the other hand, he had no contact with his sons until December 2002 when he had two visits facilitated by his sister.

At a six-month review hearing in January 2003, the court found the parents failed to regularly participate in court-ordered services and there was no substantial probability of reunification occurring within another six months. Consequently, the court terminated reunification services and set a section 366.26 hearing to select and implement a permanent plan for the children.

In anticipation of the section 366.26 hearing, respondent Merced County Department of Human Services (the department) prepared a "366.26 WIC Report." In that report, the department disclosed that the boys were adoptable and recommended that the court terminate parental rights.

Then, in early May 2003, counsel for appellant filed a section 388 petition seeking an order awarding custody of the boys to their father. Appellant's circumstances had allegedly changed because he completed his residential treatment program in early April as well as 10 sessions of parenting classes.

The court scheduled a hearing on appellant's petition for the same date as the section 366.26 hearing. On the eve of the section 366.26 hearing, the department filed an addendum report. In its report, the department questioned whether appellant was clean

and sober. The department had received information that in May, appellant had been involved in an accident and hospitalized. A blood test at the hospital was purportedly positive for drugs. A relative also made a statement that appellant had mental health issues rendering him unable to care for his children.

At the hearing, the department submitted on its original and addendum reports. Counsel for appellant called his client to the stand and offered into evidence his client's five-page handwritten letter to the court.

In his testimony, appellant first clarified that his outstanding warrant in 2002 had been for violating probation by testing positive for methamphetamine. He claimed that after his release from the residential drug rehabilitation program, he was not required to participate in any follow-up, such as N/A. He had also completed his formal probation according to a letter from the San Benito County Probation Department.

Appellant testified candidly that his current circumstances were not as good as he had hoped. After his release from the drug rehabilitation program, he found a welding job. However, he lost that job within a month or so because, in his words, "production was not good." He also moved to a Santa Nella trailer park after his release but had recently been evicted.

Currently, he had no money and was staying with another relative in San Jose. He understood that he could receive public housing assistance if the court placed the boys in his care. He also believed he could support his children once he found work as a welder.

He had a new job "lined up" when he had an accident in May 2003. According to appellant, he was involved in a dirt bike accident in which he "went off" a 15-foot cliff during a fishing trip with some relatives. Once he was released from a doctor's care, he hoped to get back to work. He admitted that at the hospital following his accident, he tested positive for alcohol as well as amphetamine or morphine. Appellant claimed, however, that he was not doing drugs. The positive drug screen in his estimation had to be for "the stuff they gave me for the pain."

Appellant also admitted trying “one little tokes or two little tokes” of marijuana out of curiosity within a few weeks. Appellant nevertheless believed he was a changed man because he was a man of God.

Appellant’s letter to the court covered much of the same material. In it, however, he also emphasized that he believed he could be a good father to his sons who, in his estimation, needed him as much as he needed them.

Following argument in the matter, the court found no genuine changed circumstances and in turn denied appellant’s section 388 petition. Having also found that the boys were adoptable, the court then terminated parental rights.

DISCUSSION

Appellant reiterates his argument to the trial court that due to changed circumstances, he is entitled to custody of his sons. On review of the record, as summarized above, we agree with the juvenile court that appellant failed to establish changed circumstances. Furthermore, he failed to satisfy his burden of proof that a change in custody would serve the children’s best interests.

As appellant’s argument acknowledges, a parent may petition the court to modify a prior order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).²)

² Section 388 provides in pertinent part:

“(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner’s relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶]

The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (b); Cal. Rules of Court, rule 1432(c).) Whether the juvenile court should modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Here, appellant's circumstances had changed little since the outset of the boys' dependency proceedings. True, appellant did complete a residential treatment program and some parenting classes in the interim. However, he still did not have a stable home or job. In addition, appellant apparently gained little insight from his treatment program into substance abuse because within a matter of a few months of his release, he was again resorting to drugs.

In any event, appellant presented no evidence that placing the children in his care would serve their interests in permanency and stability. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) Consequently, we conclude the court did not abuse its discretion by denying appellant's section 388 petition.

DISPOSITION

The order terminating parental rights is affirmed.

“(c) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes.”